

Brent O. Hatch (5715)
Hatch Law Group, PC
22 E. 100 S., Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 869-1919
hatch@hatchpc.com

Attorney for Defendant – Additional counsel listed in signature

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

EAGLE VIEW TECHNOLOGIES, INC. and
PICTOMETRY INTERNATIONAL CORP.,

Plaintiffs,

v.

NEARMAP US, INC.,

Defendant.

**DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT
PURSUANT TO LPR 6.2**

FILED UNDER SEAL

Case No.: 2:21-cv-00283

Judge: Ted Stewart

Magistrate Judge: Daphne A. Oberg

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, DUCivR 56-1 and LPR 6.2, Defendant Nearmap US, Inc. (“Nearmap”) respectfully moves for summary judgment of non-infringement as to Counts I–VIII of Plaintiffs Eagle View Technologies, Inc. (“EVT”) and Pictometry International Inc. (“Pictometry”) (collectively, “EagleView”)’s Complaint alleging infringement with respect to Nearmap’s MapBrowser, NMOS, and Roof Geometry Technology as to all asserted claims of U.S. Patent Nos. 8,670,961 (“the ’961 Patent”), 9,514,568 (“the ’568 Patent”), 10,528,960 (“the ’960 Patent”), 8,209,152 (“the ’152 Patent”), 9,135,737 (“the ’737 Patent”), 10,685,149 (“the ’149 Patent”), 8,593,518 (“the ’518 Patent”), and 8,542,880 (“the ’880 Patent”) (collectively, “the Asserted Patents”). This Motion is based on the supporting Memorandum, Appendix in Support of Nearmap’s Motion for Summary Judgment of Non-Infringement (“SJA”), pleadings and filed papers, those matters of which the Court may properly take judicial notice, and such other evidence presented to the Court for determination of the Motion.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION AND REQUESTED RELIEF

Under Nearmap’s proposed constructions, EagleView’s infringement claims for the Asserted Patents cannot stand for the following independent reasons. *First*, there is no genuine issue of disputed material fact that none of the Accused Products has a moveable visual marker under Nearmap’s construction of the claim term in the ’880 Patent. The only features that EagleView alleges to be a moveable visual marker are (1) a marker that can only be deleted and replaced rather than being draggable, and (2) polygon and line tools that are placed by the user and do not correspond to a “first location data” as required by the claims.

Second, there is no genuine issue of disputed material fact that none of Nearmap's Accused Products includes a "roof report" as Nearmap shows that term should be construed in the asserted claims of the '960, '568, '961, '737, '152, and '149 Patents. The only features that EagleView alleges to be a roof report in Nearmap's MapBrowser product simply display roof measurement information without making it into a report as required under Nearmap's construction. The same is true for what EagleView has identified as a roof report in NMOS and the GAF website. And Nearmap's [REDACTED] output [REDACTED] [REDACTED]; they are not a roof report under Nearmap's construction of the term because it requires the graphical representation of a roof model and/or determined roof measurements. EagleView's theories of infringement against Nearmap as to third-party GAF's QuickMeasure product also fail at least because Nearmap's allegedly infringing acts take place outside the United States and the acts of third-parties Pushpin and GAF cannot be attributable to Nearmap so as to sustain a claim of direct infringement as to Nearmap.

Third, the Accused Products do not infringe because the calibration claim terms are not satisfied under Nearmap's construction of those terms in the '960, '568, and '961 Patents.

Fourth, it is undisputed that the Nearmap 3D Mesh and Panorama content types in MapBrowser and Roof Geometry Technology are processed images. Such processed images are not images captured by a camera as is required to satisfy the "aerial image" and "oblique image" claim limitations under Nearmap's construction.

Fifth, there is no infringement of the '518 Patent asserted claims as to the Nearmap 3D Mesh, Panorama, and Oblique content types because there is no claimed "primary oblique image

including overlapping data” under Nearmap’s construction of the term. None of those content types display a primary oblique image including common features with an adjacent oblique image as required under Nearmap’s construction. [REDACTED]

Sixth, there is no infringement for all asserted claims of the ’568 Patent because MapBrowser and NMOS images are not “aerial images that were taken by a camera without a known spatial relationship to each other” as Nearmap has construed the claim term. It is undisputed that [REDACTED]

[REDACTED] Further, it is undisputed that [REDACTED]

II. THE ASSERTED PATENTS AND THE ACCUSED PRODUCTS

The Asserted Patents are discussed in Nearmap’s opening claim construction brief. The asserted patent claims are set forth in the chart below.¹ The claim terms for which Nearmap seeks construction are required in the independent claims (bolded) and thus also required by the dependent asserted claims. Accordingly, if the Court finds that a particular claim term is not met in an accused product, it is not met for all asserted claims of that patent which recite that term.

¹ Nearmap refers to EagleView’s Final Infringement Contentions, which are over 1,700 pages. Nearmap would be happy to submit them to the Court if it would be helpful.

EagleView accuses in this action: (1) Nearmap's MapBrowser website; (2) third-party OpenSolar's website called "Nearmap on OpenSolar" ("NMOS") that has been discontinued; and (3) Nearmap's Roof Geometry Technology.

	MapBrowser Asserted Claims	Nearmap on OpenSolar Asserted Claims	Roof Geometry Technology Asserted Claims
'960 Patent	1, 2, 3, 4, 5, 6, 7, 8	1, 2, 3, 4, 5, 7, 8	1, 2, 3, 4, 5, 6
'568 Patent	N/A	6, 10, 11, 15	6, 7, 8, 10, 11, 12, 13, 15
'961 Patent	1, 2, 7, 21, 24, 25, 29	1, 7, 22, 24, 29	1, 2, 7, 21, 22, 24, 25, 29
'880 Patent	1, 2, 14, 15, 19	1, 2, 9, 14, 15, 19	1, 2, 6, 9, 14, 15, 18
'737 Patent	1, 7, 9, 10, 16, 17, 25, 26	1, 7, 9, 10, 16, 17, 25, 26	1, 7, 9, 10, 16, 17, 25, 26
'152 Patent	2, 5, 7, 10, 17, 21, 24, 25	2, 5, 7, 10, 17, 21, 24, 25	2, 5, 7, 10, 17, 21, 24, 25
'518 Patent	13, 14, 15, 16	13, 14, 15	N/A
'149 Patent	3, 4, 5, 8, 9, 11, 13, 14	3, 4, 5, 8, 9, 11, 13, 14	3, 4, 5, 8, 9, 11, 13, 14

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Nearmap's MapBrowser product is a website. Dec. 13, 2022 Ridley Dep. Tr. at 17:1–18:14 (SJA265). There is no cost associated with accessing the website, only a cost for using particular content types within MapBrowser. Dec. 15, 2022 Celinski Dep. Tr. at 273:3–7, 274:3–10 (SJA427).

2. Nearmap offers to its customers a number of different image content types through MapBrowser, depending on their subscription. Dec. 13, 2022 Millin Dep. Tr. at 27:13–28:11 (SJA218). The image content types that are relevant here are: Vertical, Oblique, 3D Mesh, and Panorama. *Id.* The images of these different content types have different image

characteristics and use cases. Dec. 15, 2022 Celinski Dep. Tr. at 15:10–17:9 (SJA175–76).

NMOS offered access to Nearmap’s Vertical, Digital Surface Map, TrueOrtho and Oblique image content types. Dec. 9, 2022 Zevaka Dep. Tr. at 19:6–22 (SJA176). [REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 11:24–12:6 (SJA214).

3. **Nearmap Vertical** is a content type [REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 27:13–28:11 (SJA218). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 111:124–112:23 (SJA239).

4. **Nearmap 3D Mesh** [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 12:7–20 (SJA214); *see* Dec. 15, 2022 Celinski Dep. Tr. at 21:24–24:14 (SJA364) [REDACTED]

[REDACTED] 3D Mesh

images provide “3D geometry available for that location.” Dec. 13, 2022 Millin Dep. Tr. at 142:18–144:13 (SJA247),

5. [REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 55:11–21 (SJA225). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 55:22–56:12 (SJA225). [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 59:19–60:4 (SJA226). [REDACTED]

[REDACTED] *Id.* at 63:10–64:1 (SJA227). [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 59:19–60:4, 63:10–64:1 (SJA226–227); *see Id.* at 55:11–21 (SJA225); *Id.* at 55:22–56:12 (SJA225).

6. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 55:22–56:12 (SJA225).

7. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 12:7–20 (SJA214). [REDACTED] *Id.* at 15:3–16:2 (SJA215).

[REDACTED]

[REDACTED] *Id.* at 15:3–16:2 (SJA215). [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 15:3–16:2 (SJA215). [REDACTED] *Id.* at 16:3–21 (SJA215); *see* Dec. 15, 2022 Celinski Dep. Tr. at 21:24–24:14, 43:3–13 (SJA364, 369).

8. [REDACTED]
[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 161:20–162:18 (SJA252).

9. [REDACTED]
[REDACTED]
[REDACTED] *Id.* at 114:7–21 (SJA240).

10. **Nearmap Panorama.** [REDACTED]
[REDACTED] *Id.* at 10:23–11:14, 27:13–28:11 (SJA214, 218); *see* Dec. 15, 2022 Celinski Dep. Tr. at 44:1–13 (SJA369); Dec. 13, 2022 Ridley Dep. Tr. at 18:2–19:12, 22:1–15 (SJA265–66). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 154:3–22 (SJA250). [REDACTED]
[REDACTED] Dec. 15, 2022 Celinski Dep. Tr. at 43:1–16 (SJA369); Dec. 13, 2022 Ridley Dep. Tr. at 22:1–15 (SJA266).

11. [REDACTED]
[REDACTED]
[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 154:3–22 (SJA250).

12. [REDACTED]

[REDACTED] *Id.* at 76:2–6 (SJA230).

13. **Nearmap Oblique.** Using MapBrowser, users “can [] view oblique images [REDACTED]

[REDACTED]
[REDACTED] *Id.* at 74:21–75:15 (SJA230).

14. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 34:16–35:4 (SJA220).

“The photos are referenced by ID. That also includes the photogrammetric metadata; [REDACTED]

[REDACTED]
[REDACTED] *Id.* at 87:13–25 (SJA233).

15. “Photogrammetric data [REDACTED]

[REDACTED].” Dec. 15, 2022 Celinski Dep. Tr. at 17:17–21 (SJA363).

16. [REDACTED]

Id. at 19:4–17 (SJA363).

17. [REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 97:6–24 (SJA236).

[REDACTED]

[REDACTED]

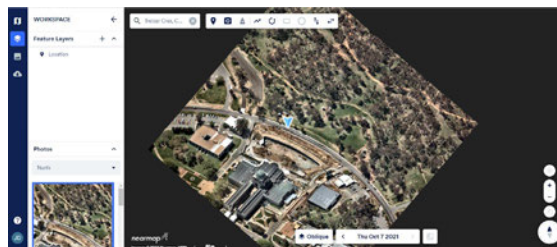
[REDACTED]

[REDACTED] *Id.* at 98:15–99:3 (SJA236).

18. “To find the pitch and aera of a roof or structure from an Oblique photo, we need to understand where each measurement point exists in real world [REDACTED]

[REDACTED] Nearmap 3D Line & 3D Area Tools
(NEARMAP_0009736 at -739) (SJA006).

19. “[I]f a user dragged from, you know, one location to another . . . within the oblique API accessed via MapBrowser,” “when you’ve actually got an oblique image on the screen, it’s one image, when you’re panning around there, that doesn’t create additional consumption because that image is already in front of you in the browser.” Dec. 15, 2022 Celinski Dep. Tr. at 277:2–11 (SJA428); *see* Dec. 13, 2022 Ridley Dep. Tr. at 18:2–19:12, 25:24–26:4 (SJA265, 267). For example:



MapBrowser User Interface, Nearmap, <https://apps.nearmap.com/maps/>.

20. [REDACTED]

[REDACTED] Dec.
13, 2022 Millin Dep. Tr. at 111:24–112:23 (SJA239). [REDACTED]

[REDACTED] *Id.* at 113:16–114:6 (SJA240). [REDACTED]

[REDACTED]

[REDACTED].

Id. at 114:7–21, 111:24–14:6 (SJA239–240).

21. [REDACTED] *Id.* at 111:24–112:23 (SJA239). [REDACTED]

[REDACTED] *Id.* at 114:7–21 (SJA240). [REDACTED]

[REDACTED] *Id.* at 114:7–21 (SJA240).

22. MapBrowser’s “Drop a Pin” feature “is the location marker, that the user needs to manually place.” Dec. 9, 2022 Zevaka Dep. Tr. at 152:4–12 (SJA209). This manually placed location marker can be moved; it can only be deleted. *Id.* at 152:4–22 (SJA209).

23. MapBrowser includes a “marker” that “gets dropped automatically when a user searches for a location.” *Id.* at 151:20–152:3 (SJA209). “[T]he search marker is a special marker that just appears where the search points to. *Id.* at 152:8–12 (SJA209).

24. MapBrowser includes a “location marker, that the user needs to manually place” if a user wants to mark a different location. *Id.* at 151:25–152:22 (SJA209).

25. The location marker cannot be moved. If a user wants to move the location marker, “they would need to place a new marker.” *Id.* at 152:13–22 (SJA209).

26. **MapBrowser’s Polygon and line tools** allow a user to manually draw multiple polygons on multiple roof facets. Dec. 13, 2022 Millin Dep. Tr. at 131:19–132:3 (SJA244). “Each [polygon] would be a separate 3D area tool.” *Id.* at 132:4–10, 38:16–23 (SJA221, 244). These are “generic tool[s] for area or line measurement of any object or item of interest that’s

viewable in [Nearmap’s] imagery.” *Id.* at 36:19–37:16 (SJA220–221). “[U]sing a 3D [polygon] area tool they [i.e., users] would mark the points of interest, so four corners of a facet in one image.” *Id.* at 119:5–120:3 (SJA241). And “the line tool allows the user make a line measurement to measure anything” rather than corresponding to a first location data. *Id.* at 36:19–37:16 (SJA220–221).

27. **MapBrowser’s Snapshot feature** “tak[es] a picture of what you see on the screen.” Dec. 13, 2022 Ridley Dep. Tr. at 69:2–70:4 (SJA376).

28. In **MapBrowser’s Projects feature**, [REDACTED] *Id.* at 155:11–156:2 (SJA397). “They may choose to use MapBrowser [including the Projects feature], which is a very simple, wonderfully elegant just web interface that, again, it’s like that Comcast box that allows to access all the content.” Dec. 15, 2022 Celinski Dep. Tr. at 15:10–17:9 (SJA362–63); Dec. 13, 2022 at Ridley Dep. Tr. at 17:1–18:1 (SJA265).

29. [REDACTED]
[REDACTED]
[REDACTED] Dec. 13, 2022 Ridley Dep. Tr. at 157:16–158:10 (SJA398). [REDACTED]
[REDACTED]

[REDACTED] *Id.* at 155:11–156:2 (SJA397).

30. In **MapBrowser’s Projects**, “there is the ability to import and export the data associated with the project. . . . [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 161:13–22 (SJA399).

31. “[T]here’s no way to kind of print out everything in [a] project.” *Id.* at 159:13–160:12 (SJA398).

32. Roof Geometry Technology has [REDACTED] “backend services” referred to as “roof geometry API” that “allows the customers to submit jobs to the roof geometry application and retrieve the completed tasks” [REDACTED]

[REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 140:7–18 (SJA246).

33. When “the analyst has finished generating the roof geometry for a location, they hit submit, [REDACTED] *Id.* at 159:6–23 (SJA251).

34. “[T]he customer is then notified that [] roof geometry is available and [] the customer would then download that geometry data.” *Id.* at 159:6–23 (SJA251).

35. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 11:24–12:6 (SJA214).

36. Roof Geometry Technology includes [REDACTED]

[REDACTED] Dec. 15, 2022 Celinski Dep. Tr. at 106:8–10 (SJA385). [REDACTED]

[REDACTED] *Id.* at 106:14–17

(SJA385). If the marker initially appears in the middle of the screen, [REDACTED]

[REDACTED] *Id.* at 106:8–10 (SJA385).

37. [REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 176:18–23 (SJA255).

38. [REDACTED]

[REDACTED] *Id.* at 177:9–16 (SJA256).

39. [REDACTED] *Id.* at 177:9–16 (SJA256).

From the perspective of an engineer, the outputs are [REDACTED]

[REDACTED] *Id.* at 185:20–186:11 (SJA258).

Dec. 15, 2022 Celinski Dep. Tr. at 112:22–
113:1, Ex. 4 [REDACTED]
(SJA450)

Dec. 15, 2022 Celinski Dep. Tr. at 112:22–
113:1, Ex. 5 [REDACTED]
(SJA453)

40. [REDACTED]

[REDACTED] Dec. 13, 2022 Millin Dep. Tr. at 176:18–23 (SJA255). [REDACTED]

[REDACTED] *Id.* at

43:3–8 (SJA222). [REDACTED]

[REDACTED] *Id.* at 176:18–23 (SJA255).

41. [REDACTED] Dec. 8, 2022

Agresta Dep. Tr. at 275:24–276:7 (SJA168). [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] *Id.* at 276:8–13 (SJA168).

42. Nearmap is a supplier to Pushpin and is independent from Pushpin. *See, e.g.*, Dec. 15, 2022 Celinski Dep. Tr. at 50:8–13 (SJA371) [REDACTED]

[REDACTED]; Dec. 8, 2022 Agresta Dep. Tr. at 51:1–7 (SJA112); Dec. 13, 2022 Millin Dep. Tr. at 141:2–12 (SJA247); Aug. 18, 2022 Milbert Dep. Tr. at 191:14–192:16, 273:21–23 (SJA071, SJA091) [REDACTED]

[REDACTED]. *See, e.g.*, Dec. 15, 2022 Celinski Dep. Tr. at 50:8–13 (SJA371); Dec. 13, 2022 Millin Dep. Tr. at 141:2–12 (SJA247). Nearmap is not responsible for Pushpin’s actions. *See, e.g.*, Dec. 15, 2022 Celinski Dep. Tr. at 50:8–13 (SJA371); Aug. 18, 2022 Millin Dep. Tr. at 141:2–12 (SJA247); Aug. 18, 2022 Milbert Dep. Tr. at 290:24–291:7 (SJA096).

43. Pushpin is a supplier to GAF. *See* Aug. 18, 2022 Milbert Dep. Tr. at 159:24–160:23, 166:21–167:13 (SJA063, SJA065) (“Q. So my question to you, is that correct, Pushpin is the one that’s providing the roof reports that are identified in this agreement? A. Yeah, that’s right.”); Dec. 15, 2022 Celinski Dep. Tr. at 226:12–15 (SJA415). It supplies QuickMeasure reports to GAF. *See* Aug. 18, 2022 Milbert Dep. Tr. at 182:1–9, 166:21–167:13 (SJA069,

SJA065) (“I think the actual generation of the QuickMeasure report is done, you know on the Pushpin side.”); Dec. 8, 2022 Agresta Dep. Tr. at 60:16–61:9 (SJA114–15); Aug. 18, 2022 Milbert Dep. Tr. at 166:21–167:13 (SJA065); GAF QuickMeasure, <https://www.gaf.com/en-us/quickmeasure> (last visited Jan. 23, 2023). [REDACTED]

[REDACTED]. Aug. 18, 2022 Milbert Dep. Tr. at 293:22–294:7 (SJA096-97); Jan. 12, 2023 Laddha Dep. Tr. at 30:11–17 (SJA465).

44. Nearmap sells transactions to Pushpin [REDACTED]
[REDACTED] Aug. 18, 2022 Milbert Dep. Tr. at 178:22–179:12 (SJA068); NEARMAP_0134799 at -801 [REDACTED] (SJA009); *see* NEARMAP_0134808 at -810 [REDACTED] (SJA019). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
NEARMAP_0134799 at -801 [REDACTED] (SJA009); *see* NEARMAP_0134808 at -810 [REDACTED] (SJA019).

45. Further, [REDACTED].
Aug. 18, 2022 Milbert Dep. Tr. at 285:9–13 (SJA094) [REDACTED]
[REDACTED]
[REDACTED] NEARMAP_0134808 at -810 [REDACTED] (SJA019). [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] Aug. 18, 2022 Milbert Dep. Tr. at 285:25–286:6 (SJA094-95) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] NEARMAP_0134799 at -801 [REDACTED]

[REDACTED] (SJA009); *see* NEARMAP_0134808 at -810–11 [REDACTED]

(SJA019–20). [REDACTED]

[REDACTED]

NEARMAP_0134799 at -804 [REDACTED] (SJA012).

46. The GAF website includes a pin on an image and states, “If the pin is not in the correct location, please remove the pin, adjust the map, and place a new pin.” GAF QuickMeasure, <https://quickmeasure.gaf.com/guest-home-page> (last visited Jan. 23, 2023) .

47. The express agreement by Nearmap to supply Pushpin is not a joint enterprise; it is a supply agreement. Dec. 8, 2022 Agresta Dep. Tr. at 60:16–20, 81:1–82:1, 118:14–119:6 (SJA114, 120, 129).

48. Nearmap does not have an express agreement with GAF. Dec. 15, 2022 Celinski Dep. Tr. at 157:17–20 (SJA398).

49. Nearmap does not have an implied agreement with GAF. *Id.* at 157:17–20 (SJA398).

50. Nearmap and Pushpin do not have an equal right to a voice and an equal right to control any enterprise. *Id.* at 247:20–249:1 (SJA398); NEARMAP_0134799–807 (Dec. 3, 2020 Document) (SJA007–15); NEARMAP_0134724 (First Amendment) (SJA016); NEARMAP_0135153–54 (Second Amendment) (SJA021–22).

51. GAF decides what to include in GAF’s QuickMeasure product. Dec. 8, 2022 Agresta Dep. Tr. at 61:1–9 (SJA115).

52. “Nearmap on OpenSolar is a product designed and developed by OpenSolar.” Dec. 9, 2022 Zevaka Dep. Tr. at 18:6–23 (SJA176). “OpenSolar by itself is a solar design software—software that allows its users who are exclusively solar installers to design solar systems—rooftop solar systems.” *Id.* at 18:6–23 (SJA176).

53. OpenSolar’s customers are “solar installers” who use OpenSolar to “perform solar calculations, and calculate the total energy output and associated financial calculations for the purpose of creating a solar proposal that their end customers who are homeowners can then purchase . . . and subsequently design.” *Id.* at 18:6–23 (SJA176).

54. “NMOS has vertical imagery, oblique imagery, DSM, which is digital surface model, and True Ortho” *Id.* at 19:6–22 (SJA176).

55. NMOS includes a “Panel Groups” feature. The features are placed on an image by a user: “the roofer dr[a]w[s] a polygon outlining the roof facet.” *See id.* at 149:25–150:3 (SJA209). The polygon itself is not dragged, but instead it is shaped point-by-point to align with an area of interest. *See id.* at 150:11–14 (SJA209).

56. “Subscription to Nearmap on OpenSolar would be sufficient to create a system and [] generate a proposal containing the energy yield and the financial characteristics and a picture of a house with the solar panels on it for the solar installers then to customize [for] homeowners.” *Id.* at 68:10–18 (SJA188).

57. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dec. 14, 2022 Besley Dep. Tr. at 49:9–50:2 (SJA349).

IV. LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. Although the party moving for summary judgment bears the burden of showing “the absence of a genuine issue of material fact,” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the moving party need not negate the nonmovant’s claim. Rather, the movant need only show “an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. “If the moving party carries this initial burden, the party opposing the motion for summary judgment may not rest upon mere allegations or denials of his pleading.” *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (internal quotation omitted). After all, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient to defeat a properly supported motion for summary judgment.” *Id.*

When determining patent infringement: (1) the court must determine the meaning and scope of the patent claims, and (2) then it must compare the properly construed claims to the allegedly infringing device. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995). “[I]f the Court finds that no reasonable jury could find that every limitation recited in the properly construed claim . . . is found in the accused device . . . summary judgment of noninfringement should be granted.” *Utah Med. Prods., Inc. v. Clinical Innovations Assocs., Inc.*, 79 F. Supp. 2d 1290, 1299 (D. Utah 1999), *aff’d*, 251 F.3d 171 (Fed. Cir. 2000) (internal quotation omitted).

V. ARGUMENT

A. **The ’880 Patent Asserted Claims Are Not Infringed Because Nearmap’s Accused Products Do Not Satisfy the Limitation of a Moveable Visual Marker Corresponding to a First Location Data and then Final Location**

The ’880 Patent claims are directed to a moveable visual marker that corresponds to an initial location data input by a user, such that the user can signal acceptance of the final location of the marker once moved. Nevertheless, EagleView reads this patent to cover markers that are not moveable and do not signal a first location or a final location, let alone user acceptance of the final location. This is contrary to Nearmap’s construction of the visual marker term, i.e., that it “initially corresponds to the first location data input by the user” and “is draggable on a computer monitor from its initial location to a final location on top of a building to more precisely identify the location of the building structure corresponding to the first location data.” Under Nearmap’s construction, there is no genuine dispute that none of the Accused Products literally infringes.

EagleView’s doctrine of equivalents allegations are conclusory and fail to defeat summary judgment. *See Augme Techs., Inc. v. Yahoo! Inc.*, 755 F.3d 1326, 136–37 (Fed. Cir.

2014). All EagleView says for equivalence is that “[d]eleting and replacing a pin” in MapBrowser “either literally infringes or infringes under the doctrine of equivalents” and that the “Panel Groups” feature in NMOS “either literally infringes or infringes under the doctrine of equivalents,” without further analysis. Such equivalence theories, even if supported by any evidence—which they are not—fail as a matter of law because they would vitiate the claimed limitation by writing out the claim term “moveable.” *See Akzo Nobel Coatings, Inc. v. Dow Chem. Co.*, 811 F.3d 1334, 1342 (Fed. Cir. 2016). Further, the claimed marker must initially correspond to initial location data input by the user, be moved by the user, and the user must accept the final location of the marker. Therefore, there can be no genuine dispute of material fact that the accused features do not serve the same function, work in the same way, or lead to the same result as what is claimed, nor is it insubstantially different. *See Tex. Instr., Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1567 (Fed. Cir. 1996).

MapBrowser. EagleView’s allegations that MapBrowser satisfies the claim term are based solely on the: (1) “drop a pin” feature and (2) “Polygon” and “Line” layers feature. The undisputed evidence including the evidence cited by EagleView is that these features do not infringe. *First*, the dropped pin is not moveable and does not correspond to a first location data: that feature adds a pin to an image, and while that pin can be deleted and replaced with a new pin, the original pin is not moveable. SUMF ¶ 25 (citing Dec. 9, 2022 Zevaka Dep. Tr. at 152:13–22 (SJA209)). The undisputed testimony from Nearmap’s technical and corporate witnesses is that there are two kinds of markers dropped when a user searches for a location. One kind of search “marker gets dropped automatically when a user searches for a location.” *Id.* ¶ 23 (Dec. 9, 2022 Zevaka Dep. Tr. at 151:20–24 (SJA209)). And “[t]here is another tool, which

is the location marker, that the user needs to manually place.” *Id.* ¶ 24 (Dec. 9, 2022 Zevaka Dep. Tr. at 152:4–12 (SJA209)). Neither the search marker nor the manually placed location marker cannot be moved; they can only be deleted. *Id.* ¶ 22 (Dec. 9, 2022 Zevaka Dep. Tr. at 152:4–22 (SJA209)). Thus, neither corresponds to first location data. *Id.* (Dec. 9, 2022 Zevaka Dep. Tr. at 151:13–152:22 (SJA209)).

Second, the “Polygon” and “Line” feature layers in MapBrowser fail to correspond to a first location data because the features only allow a user to place a polygon or line on Nearmap’s imagery, rather than indicating a first location data or a final location. These feature layers are “generic tool[s] for area or line measurement of any object or item of interest that’s viewable in [Nearmap’s] imagery.” *Id.* ¶ 26 (Dec. 13, 2022 Millin Dep. Tr. at 36:19–37:16 (SJA220)).

“[U]sing a 3D [polygon] area tool [a user] would mark the points of interest, so four corners of a facet in one image” and not correspond to first location data. *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 119:5–120:3 (SJA241)). Similarly, “the line tool allows the user [to] make a line measurement to measure anything” rather than corresponding to a first location data. *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 36:19–37:16 (SJA220–221)).

EagleView’s allegations that [REDACTED] satisfies the visual marker claim term identify (1) dropping a pin on third-party GAF’s website, and (2) dropping a marker in [REDACTED]. ***First***, as to dropping a pin, the only evidence that EagleView cites in its contentions that the claim term is met is GAF’s website. Even if GAF’s website could be evidence of Nearmap’s infringement, it is undisputed that the GAF pin itself is not moveable. The GAF website states: “If the pin is not in the correct location, please remove the pin, adjust the map, and place a new pin.” *Id.* ¶ 46 (GAF

QuickMeasure, <https://quickmeasure.gaf.com/guest-home-page> (last visited Jan. 23, 2023)).

Second, the only evidence that EagleView cites in [REDACTED] as satisfying the claim term is a non-moveable marker. It is undisputed that: “The roof [can be] moved relative to the marker. The marker [stays] exactly where it was.” *Id.* ¶ 36 (Dec. 15, 2022 Celinski Dep. Tr. at 106:14–17; *see also id.* at 106:8–10 (SJA385)).

NMOS. EagleView alleges that NMOS satisfies the visual marker claim term based on: (1) the “Panel Groups” feature, and (2) the “Annotation” feature. The only evidence that EagleView cites to images of the NMOS user interface for the first feature make clear that it is limited to the placement of a polygon frame over an image. According to EagleView, the polygon frame is “moveable” because the user can pan the image underneath the frame. This does not satisfy the claim term because no feature—and none of the NMOS features identified by EagleView—is moveable or correspond to a first location data. Further, polygon frames do not function to “more precisely identify the location of the building structure corresponding to the first location data.” For example, EagleView provides no evidence that the user is restricted to using NMOS’s features within the polygon frame after inputting first location data nor is there an option for the user to indicate that the location captured within the frame is the correct location of interest.

With respect to the “Annotation” feature, EagleView asserts that the addition of a circle on an image is a marker and it is moveable because it can be dragged. As an initial matter, the placement of a circle does not mean that it corresponds to “first location data.” It is simply an outline, not an indication of location: “the roofer dr[a]w[s] a polygon outlining the roof facet.” *See id.* ¶ 55 (Dec. 9, 2022 Zevaka Dep. Tr. at 149:25–150:3 (SJA209)). The polygon itself is not

dragged, but instead it is shaped point-by-point to align with an area of interest. *See id.* (Dec. 9, 2022 Zevaka Dep. Tr. at 150:11–14 (SJA209)). Further, allowing a user to outline a roof facet with a circle does not equate to “a visual marker that is moveable on a computer monitor” that can “be moved to a final location on top of the building *to more precisely identify* the location of the building roof structure, the final location having location coordinates.” ’880 Patent, Claim 1 (JA0289) (emphasis added).

B. The ’960, ’568, ’961, ’737, ’152, and ’149 Patent Asserted Claims Are Not Infringed Because MapBrowser, NMOS, and GAF’s QuickMeasure User Interface or [REDACTED] Outputs of Roof Geometry Technology Do Not Satisfy the Limitation of a Roof Report

Under Nearmap’s construction, there is no infringement of the asserted claims of the ’960, ’568, ’961, ’737, ’152, and ’149 Patents (the “EVT” Patents). Nearmap proposes that the roof report claim terms be construed to mean “an electronic file or paper document transformed from a roof model and/or determined roof measurements that graphically shows a representation of the roof model and/or determined roof measurements.”² EagleView alleges that the claim term is satisfied by (1) MapBrowser’s website display of roof measurement information in its user interface and Snapshot and Project features, (2) NMOS’s proposal output, (3) for Roof Geometry Technology, Nearmap’s [REDACTED], (4) [REDACTED] [REDACTED] third-party GAF’s QuickMeasure website display of roof measurement information

² EagleView’s infringement contentions read this term broadly to mean the mere display of roof measurement information in a website user interface, which was indisputably known in the prior art and not the same as a roof report. *See Eagle View Techs., Inc. v. Roofr, Inc.*, No. 1:21-cv-1852-RGA, 2023 U.S. Dist. LEXIS 9182, at *14 (D. Del. Jan. 19, 2023) (“EagleView has not made plausible and specific allegations that the user interface is inventive.”); *compare* ’152 Patent, Figs. 3A–F (JA0096–101) (“individuals pages of an example roof estimate report”), *with* ’152 Patent, Figs. 4A–F, 5A–D, 6A–D, 7A–C (JA0102–118).

in its user interface, and (5) [REDACTED], third-party's GAF's QuickMeasure report. Under Nearmap's proposed construction of this claim, each theory fails and there is no infringement of the asserted claims of the '960, '568, '961, '737, '152, and '149 Patents (the "EVT" Patents) as a matter of law.

1. No "Roof Report" / "Roof Estimate Report" in the MapBrowser Website

The only parts of the MapBrowser website that EagleView alleges to be a "roof report" in the MapBrowser website: (1) the user interface display, (2) the Snapshot feature, and (3) the MapProject feature. First, the display of roof measurement information in the MapBrowser user interface display does not satisfy the claim term under Nearmap's construction because such display is not "an electronic file or paper document transformed from a roof model and/or determined roof measurements" or a transformation of a 3D model or determined roof measurements. At best, it is an on-screen display of an image viewer and its associated measuring tools. See SUMF ¶ 28 (Dec. 15, 2022 Celinski Dep. Tr. at 15:10–17:9 (SJA362–63) ("They may choose to use MapBrowser, which is a very simple, wonderfully elegant just web interface that, again, it's like that Comcast box that allows to access all the content.")); *see id.* (Dec. 13, 2022 at Ridley Dep. Tr. at 17:1–18:1 (SJA265). Second, it is undisputed that the Snapshot function simply "tak[es] a picture of what you see on the screen," rather than transformation that information. *Id.* ¶ 27 (Dec. 13, 2022 Ridley Dep. Tr. at 69:2–70:4 (SJA376)). Under Nearmap's construction, this does not meet the claim term because it is not an "electronic file or paper document transformed from a roof model and/or determined roof measurements." *See id.* Third, it is undisputed that the Projects feature [REDACTED]

“[W]hat you save when you save a project is you save whatever is on the map that you’re viewing at the time.” *Id.* ¶ 28 (Dec. 13, 2022 Ridley Dep. Tr. at 155:11–156:2 (SJA397)). It does not infringe under Nearmap’s construction as it is not an “electronic file or paper document transformed from a roof model and/or determined roof measurements.”

2. No “Roof Report” / “Roof Estimate Report” in NMOS Proposal and Projects and Snapshot Features of the NMOS Website

EagleView alleges that the claim term is satisfied in the third-party NMOS website based on: (1) the proposal output generated by NMOS, (2) the Project feature in the NMOS user interface, and (3) Snapshot feature in the NMOS user interface. **First**, the proposal output generated by NMOS does not contain roof measurement information much less transform it. It is undisputed that the NMOS proposal output contains only a mockup of solar panels: it “contain[s] the energy yield and the financial characteristics and a picture of a house with the solar panels on it for the solar installers then to customize [for] homeowners.” *Id.* ¶ 56 (Dec. 9, 2022 Zevaka Dep. Tr. at 68:10–18 (SJA188)). **Second**, as with MapBrowser Projects, no facts evince that the Projects feature in NMOS saves a transformation of a 3D model or determined roof measurements. **Third**, as with the MapBrowser user interface and the MapBrowser Snapshot feature, the NMOS website simply displays roof measurement information as demonstrated in the images of the user interface relied on by EagleView. *See id.*

3. No “Roof Report” / “Roof Estimate Report” in the [REDACTED] Outputs of Roof Geometry Technology or GAF’s User Interface

The only Nearmap feature identified by EagleView as satisfying the claim term in Roof Geometry Technology are the [REDACTED] outputs supplied by Nearmap to Pushpin. [REDACTED]

Dep. Tr. at 177:9–16, 185:20–186:11 (SJA256, SJA258)). [REDACTED]. *Id.* ¶ 39 (Dec. 13, 2022 Millin

██████████ *Id.* (Dec. 15, 2022 Celinski Dep. Tr. at 112:22–113:1, Ex. 4 ██████████
██████████ (SJA450)); Dec. 15, 2022 Celinski Dep. Tr. at 112:22–113:1, Ex. 5 ██████████
██████████ (SJA453)). Thus, under Nearmap’s construction, the ██████████ are not a roof
report, consistent with specifications. *See* ’737 Patent, Col.7:9–18 (JA0178); ’152 Patent,
Col.7:17–26 (JA0126); ’149 Patent, Col.7:44–53 (JA0232); *see* ’961 Patent, Col.10:38–44
(JA0027); ’568 Patent, Col.10:44–50 (JA0059).

In addition, EagleView’s asserted process claim theories as to “roof report” fail because the accused functionality is not performed by Nearmap within the United States. United States patent law “operate[s] only domestically and do[es] not extend to foreign activities.” *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454–55 (2007).³ “[A] process cannot be used ‘within’ the United States as required by section 271(a) unless each of the steps is performed within this country.” *NTP, Inc. v. Resch. In Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005). At the very least, it is undisputed that the alleged [REDACTED] outputs are generated outside the United States [REDACTED] SUMF ¶ 40 (Dec. 13, 2022 Millin Dep. Tr. at 176:18–23 (SJA255)). Similarly, EagleView’s asserted system claim theories fail because a claimed system is used in a place where “the system as a whole is put into service, the place where

³ See, e.g., '152 Patent, Claims 2, 5, 7, 10, 17, 21, 24, and 25; '880 Patent, Claims 1, 2, 6, and 9; '961 Patent, Claims 21, 22, and 29; '737 Patent, Claims 1, 7, 9, 10, 16, 17, 25, and 26; '960 Patent, Claims 1–6; '149 Patent, Claims 3–5, 8, 9, 11, and 13.

control of the system is exercised and beneficial use of the system obtained.”⁴ *NTP*, 418 F.3d at 1317. [REDACTED].

Dec. 15, 2022 Celinski Dep. Tr. at 71:12–72:12, 125:23–127:2 (SJA376, 390). [REDACTED]
[REDACTED] SUMF ¶ 41 (Dec. 8, 2022 Agresta Dep. Tr. at 276:8–13 (SJA168); Dec. 8, 2022 Agresta Dep. Tr. at 275:24–276:7 (SJA158)).

4. No Direct Infringement by Nearmap with Respect to “Roof Report” / “Roof Estimate Report” Based on Third-Party Actions

EagleView accuses Nearmap of infringement based on a third-party’s website (GAF). But there is no direct infringement by Nearmap as to the GAF website user interface under Nearmap’s construction because, as with MapBrowser, the GAF website cited by EagleView simply displays roof models and measurement information; it is not “an electronic file or paper document transformed from a roof model and/or determined roof measurements.” *Id.* ¶ 43 (GAF QuickMeasure, <https://www.gaf.com/en-us/quickmeasure> (last visited Jan. 23, 2023)).

Further, EagleView’s claims of direct infringement against Nearmap for acts performed by third-party GAF fail.⁵ As a matter of law, EagleView’s attempt to hold Nearmap accountable for a third-party GAF product fails. According to EagleView, the claimed “roof report” is infringed by Nearmap because of third-party GAF’s sale of QuickMeasure reports, but such reports are indisputably not generated by Nearmap. *See id.* (Dec. 8, 2022 Agresta Dep. Tr. at

⁴ *See, e.g.*, ’880 Patent, Claims 14, 15, and 18; ’961 Patent, Claims 1, 2, 7, 24, and 25; ’568 Patent, Claims 6–8, 10–13, and 15; ’149 Patent, Claim 14.

⁵ The GAF QuickMeasure product is the same product accused of infringement in *EagleView Technologies Inc. v. GAF Materials LLC*, 2:22-cv-00215, Complaint at 2 (D. Utah, Dkt. No. 1). GAF is not a defendant in this action. *Id.*

60:16–61:9 (SJA114–15); Aug. 18, 2022 Milbert Dep. Tr. at 166:21–167:13 (SJA065)). There is no dispute that the only information that Nearmap provides [REDACTED] [REDACTED] (which are not roof reports as discussed above)—is supplied to another third-party, Pushpin, and not GAF. *Id.* It is Pushpin who then supplies to GAF what becomes the QuickMeasure product. *Id.*

Yet, EagleView accuses Nearmap of direct infringement based on actions taken by third-parties with respect to GAF’s QuickMeasure product. *See id.* This fails as a matter of law. Direct infringement “occurs where all steps of a claimed method are performed by or attributable to a single entity.” *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015). Where, as here, EagleView alleges more than one actor is involved in practicing the claimed steps, the acts of one are attributable to the other such that a single entity is responsible for the direct infringement only “(1) where that entity directs or controls others’ performance,” or “(2) where the actors form a joint enterprise.” *Id.* The undisputed facts are that Pushpin and GAF’s acts are not attributable to Nearmap.

a. Pushpin’s Acts Are Not Attributable to Nearmap

In third-party Pushpin’s uncontroverted words, Nearmap is a supplier for and independent from Pushpin. *See, e.g.*, SUMF ¶ 42 (Aug. 18, 2022 Milbert Dep. Tr. at 191:14–192:16, 273:21–23 (SJA071, 091); Dec. 8, 2022 Agresta Dep. Tr. at 51:1–7 (SJA112)). **First**, Nearmap is not responsible for Pushpin’s actions let alone directing or controlling Pushpin’s performance in supplying GAF. *See, e.g., id.* (Dec. 15, 2022 Celinski Dep. Tr. at 50:8–13 (SJA371)); Aug. 18, 2022 Milbert Dep. Tr. at 290:24–291:1, 291:3–7 (SJA096)). [REDACTED]

[REDACTED] Nearmap does not “establish the manner and timing of [Pushpin’s] performance,”
Akamai, 797 F.3d at 1024. *See generally id.* (NEARMAP_0134799 at 803–07 [REDACTED]
 [REDACTED] (SJA011–15); NEARMAP_0134724 (First Amendment) (SJA016);
 NEARMAP_0135153–54 (Second Amendment) (SJA021–22)); *see also Akamai*, 797 F.3d at
 1024 (“The contract delineates the [claimed] steps customers must perform if they use the
 Limelight service.”). [REDACTED]
 [REDACTED]. *See*
Travel Sentry, Inc. v. Tropp, 877 F.3d 1370, 1379–80 (Fed. Cir. 2017). [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] SUMF ¶ 45 (NEARMAP_0134808 at -810 [REDACTED]
 [REDACTED] (SJA019); NEARMAP_0134799 at -801 [REDACTED]
 [REDACTED] (SJA009); NEARMAP_0134808 at -810–11 [REDACTED]
 (SJA019–20)).

Second, for the same reasons, the elements of a joint enterprise are not met. *See Akamai*, 797 F.3d at 1023. [REDACTED]

SUMF ¶ 47 (Dec. 8, 2022 Agresta Dep. Tr. at 60:16–20, 81:18–82:1, 118:14–119:6 (SJA114, 120, 129)).

████████████████████ *Id.* ¶ 50 (Dec. 15, 2022 Celinski Dep. Tr. at 247:20–249:1 (SJA420–21)); NEARMAP_0134799–807 (Dec. 3, 2020 Document) (SJA007–15); NEARMAP_0134724 (First Amendment) (SJA016); NEARMAP_0135153–54 (Second Amendment) (SJA021–22)). GAF,

and not Nearmap, decides what to include in GAF's QuickMeasure product. *Id.* ¶ 51 (Dec. 8, 2022 Agresta Dep. Tr. at 61:1–9 (SJA115)).

b. GAF's Acts Are Not Attributable to Nearmap

58. Setting aside the disputed fact issues, Nearmap does not direct or control third-party GAF or its customers' actions. *Id.* ¶ 43 (Aug. 18, 2022 Milbert Dep. Tr. at 166:21–167:13 (SJA065)). And GAF does not direct or control Nearmap. *See, e.g., id.* (Dec. 15, 2022 Celinski Dep. Tr. at 226:1–15 (SJA415)). In addition, the undisputed evidence is that there is no joint enterprise between Nearmap and GAF. Nearmap and GAF do not have an equal right to a voice in the direction of any enterprise. *See Akamai*, 797 F.3d at 1023. It is undisputed that third-party GAF and its customers “act independently on their own” from Nearmap. *See id.* at 1025.

See *id.*; SUMF ¶ 43 (Aug. 18, 2022 Milbert Dep. Tr. at 293:22–294:7 (SJA096-97)). [REDACTED], GAF also does not have an implied agreement with Nearmap as Pushpin, Nearmap, and GAF's corporate witnesses have all testified. *Id.* ¶ 49 (Dec. 15, 2022 Celinski Dep. Tr. at 157:17–20; 226:1–15 (SJA398, 415)); *id.* ¶ 43 (Aug. 18, 2022 Milbert Dep. Tr. at 293:22–294:7 (SJA096-97); Jan. 12, 2023 Laddha Dep. Tr. at 30:11–17 (SJA465)).

C. The '960, '568, and '961 Patent Asserted Claims Are Not Infringed Because the Accused Products Do Not Satisfy the Calibrating Claim Terms

Under Nearmap's construction of this term, which requires “converting the distance in pixels between two points on an aerial image into a physical length using image scale information after the aerial image and image scale information is received by roof measurement

software,” there is no genuine issue of material fact that none of the Accused Products satisfy this claim requirement because they do not determine roof measurements by converting pixel distances in aerial images into physical lengths using image scale information. [REDACTED]

[REDACTED] *Id.* ¶ 21
(Dec. 13, 2022 Millin Dep. Tr. at 112:22–23 (SJA239)). [REDACTED]

[REDACTED] *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 114:7–21
(SJA240)). [REDACTED]

[REDACTED] *Id.* (Dec. 13, 2022 Millin Dep. Tr.
at 114:7–21 (SJA240)). [REDACTED]

- **Nearmap Vertical.** [REDACTED]

[REDACTED] *Id.* ¶ 3
(Dec. 13, 2022 Millin Dep. Tr. at 111:24–112:23(SJA239))

- **Nearmap Oblique.** Nearmap Oblique images are “oblique images” that are “source photo images,” “which are images that have been captured by aircraft that have been processed, for instance, color corrected.” *Id.* ¶ 13 (Dec. 13, 2022 Millin Dep. Tr. at 74:21–75:15 (SJA230)). [REDACTED]

[REDACTED] *Id.* ¶ 20 (Dec. 13, 2022 Millin Dep. Tr.
at 111:24–114:6 (SJA239–40)). [REDACTED]

[REDACTED] *Id.* (Dec. 13, 2022
Millin Dep. Tr. at 114:4–6 (SJA240)). [REDACTED]

[REDACTED] *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 114:7–21 (SJA240)).

- **Nearmap 3D Mesh.** Nearmap 3D Mesh “is really a way of creating . . . a virtual world where [Nearmap] refer[s] to it as 3D reconstruction. [Nearmap] take[s] a test of aerial photos and [] attempt[s] to reconstruct what the photos were seeing as a virtual world.” *Id.* ¶ 7 (Dec. 13, 2022 Millin Dep. Tr. at 12:7–20 (SJA212)). “3D mesh is not an exact reconstruction.” *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 15:3–16:2 (SJA215)). [REDACTED]

[REDACTED] *Id.* ¶ 9 (Dec. 13, 2022 Millin Dep. Tr. at 114:7–21 (SJA240)) [REDACTED]

[REDACTED] EagleView has not presented any evidence to the contrary. [REDACTED]

[REDACTED] *See, e.g., id.* ¶ 18 (NEARMAP_0009736 at -379 (SJA006)). And EagleView’s other attorney arguments are either pure conjecture or just plain wrong. [REDACTED]

[REDACTED] This circular reasoning is not evidence that can defeat summary judgment. As another example, EagleView vaguely asserts that third-party Bentley’s ContextCapture software converts distances in pixels to physical distances “as part of the 3D reconstruction process.” Again, this is not evidence. Similarly, EagleView’s vague and

incomplete allegations that NMOS practices the required “calibrating” step by instructing users to first indicate each of the vertices of a particular roof facet is insufficient to create a genuine dispute.

D. Nearmap 3D Mesh and Panorama Content Types in MapBrowser and Roof Geometry Technology Do Not Satisfy the Disputed Aerial Image Claim Terms

1. The ’960, ’568, ’961, ’737, ’152, and ’149 Patent Asserted Claims Are Not Infringed Because Nearmap 3D Mesh and Panorama Content Types in MapBrowser and Roof Geometry Technology Do Not Satisfy the Limitation of an Aerial Image

Under Nearmap’s construction of the aerial image claim terms,⁶ there is no infringement of 3D Mesh and Panorama content types in MapBrowser and Roof Geometry Technology which display processed images rather than images captured by a camera. EagleView’s only allegations that this term is met is literal infringement.

Nearmap 3D Mesh. Rather than displaying images captured by a camera, Nearmap 3D Mesh depicts a virtual world with processed virtual images. It is what Nearmap calls a “composite product” in that “it contains 3D geometry data and texture data that is originally processed from aerial photos that is then transformed and reprojected and blended into texture data.” *Id.* ¶ 4 (Dec. 13, 2022 Millin Dep. Tr. at 12:7–20 (SJA212)). “3D mesh is really a way of creating a virtual representation of the world. It’s a virtual world where [Nearmap] refer[s] to it

⁶ EagleView alleges that MapBrowser and Roof Geometry Technology satisfy (1) “aerial image(s)” / “aerial image file(s)” (all asserted claims of the ’960, ’568, ’961, ’737, ’152, and ’149 Patents), (2) “aerial image” / “aerial imagery” (all asserted claims of the ’880 Patent), (3) “oblique image(s)” (all asserted claims of the ’518 Patent), and (4) “wherein the primary and secondary oblique images match the perspectives from which the primary and secondary oblique images were captured” (all asserted claims of the ’518 Patent).

as 3D reconstruction. [Nearmap] take[s] a set of aerial photos and [] attempt[s] to reconstruct what the photos were seeing as a virtual world.” *Id.*

Importantly, 3D Mesh is not the same as images captured by a camera, which is fatal to EagleView’s equivalence arguments: 3D Mesh imagery is substantially different from the claimed images taken by a camera (as construed by Nearmap), and also substantially different from the claimed images in the function the 3D Mesh performs (e.g., 3D reconstruction of an environment versus a 2D depiction), the way it performs (e.g., 3D Mesh and not camera-captured images require processing, transforming, and reprojecting), and the result (e.g., 3D Mesh is an imperfect 3D reconstruction of the world whereas a camera-captured image is a perfect 2D reconstruction). *See Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1312 (Fed. Cir. 2009). The undisputed testimony is that “3D mesh is not an exact reconstruction.” SUMF ¶ 7 (Dec. 13, 2022 Millin Dep. Tr. at 15:3–16:2 (SJA215)). [REDACTED]

[REDACTED] *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 16:3–21 (SJA215); Dec. 15, 2022 Celinski Dep. Tr. at 21:24–24:14, 43:3–13 (SJA364, 369)).

Nearmap Panorama. [REDACTED]

[REDACTED] *Id.* ¶ 10 (Dec. 13, 2022 Millin Dep. Tr. at 10:23–11:14 (SJA212)). [REDACTED]

[REDACTED] *Id.* (Dec. 13, 2022 Millin Dep. Tr. at 27:13–28:11 (SJA218); Dec. 15, 2022 Celinski Dep. Tr. at 44:1–13 (SJA369); Dec. 13, 2022 Ridley Dep. Tr. at 18:2–19:12, 22:1–15 (SJA265–66)). As with 3D

Mesh, the imagery in Nearmap Panorama when compared with photographs taken by camera does not “perform[] substantially the same function in substantially the same way with substantially the same result as each claim limitation of the patented product.” *Crown Packaging Tech.*, 559 F.3d at 1312. “[T]his ortho-projection process is effectively creating a warped and distorted view of the images because it’s—they’re being projected onto a terrain surface.” SUMF ¶ 10 (Dec. 13, 2022 Millin Dep. Tr. at 154:3–22 (SJA250); Dec. 15, 2022 Celinski Dep. Tr. at 43:1–16 (SJA369)).

2. The ’880 Patent Asserted Claims Are Not Infringed Because Nearmap 3D Mesh and Panorama Content Types in MapBrowser and Roof Geometry Technology Do Not Satisfy the Limitation of an Aerial Image

The agreed-upon construction for this ’880 Patent claim term is that “aerial imagery means pictures, normally including photographs (visual light, infrared, color, black and white, or otherwise) *taken from an overhead view* (straight down, oblique, or otherwise) with respect to a building roof. This may include imagery taken from airplanes, satellites, balloons, or otherwise.” Under this construction, there is no infringement as to Nearmap 3D Mesh and Panorama content types in MapBrowser and Roof Geometry Technology because the images in those content types are not taken from a camera let alone taken from an overhead view. *See id.* ¶ 4 (Dec. 13, 2022 Millin Dep. Tr. at 12:7–20 (SJA212); *id.* ¶ 2 (Dec. 13, 2022 Millin Dep. Tr. at 27:13–28:11 (SJA218)). Further, as above, the imagery in these content types is substantially different from the claimed imagery as construed, and also substantially different from the claimed imagery in function, way, and result.

3. The '518 Patent Asserted Claims Are Not Infringed Because Nearmap 3D Mesh and Panorama Content Types in MapBrowser Do Not Satisfy the Limitation of Oblique Images Matching the Perspectives From Which They Were Captured

Under Nearmap's construction, the term "oblique image(s)" in all asserted claims of the '518 Patent is "an image captured at an angle that is still in the original form the camera captured and has not been re-projected into a mathematical model." EagleView alleges literal infringement, which there is not, as discussed above: Nearmap 3D Mesh and Panorama display processed images rather than an image captured at an angle.

E. The '518 Patent Asserted Claims Are Not Infringed Because MapBrowser and NMOS Do Not Satisfy the Limitation of a "Primary Oblique Image Including Overlapping Data" for MapBrowser and NMOS

Nearmap's construction is that this term means "primary oblique image including common features with an adjacent oblique image." EagleView alleges that certain content types, including content types 3D Mesh, Panorama and Oblique in MapBrowser and NMOS, satisfy the claim term "primary oblique image including overlapping data." This does not create a genuine issue of disputed material fact that this term is met under Nearmap's construction. For MapBrowser, EagleView cites only to the ability of a user to pan around in Nearmap Panorama such that "some of the same houses are visible after panning to the right." But none of the images in Nearmap Panorama are overlapping oblique images as required by the claims; and EagleView's contentions do not identify evidence that Nearmap 3D Mesh or Nearmap Oblique meet this term.

- **Nearmap Panorama.** [REDACTED] SUMF ¶ 10 (Dec. 15, 2022 Celinski Dep. Tr. at 43:1–16 (SJA369); Dec. 13, 2022 Ridley Dep. Tr. at 22:1–15 (SJA266)); *see id.* ¶ 11 (Dec. 13, 2022 Millin Dep. Tr. at 154:3–22 (SJA250)) [REDACTED]

- **Nearmap 3D Mesh.** This content type does not have an oblique image, let alone multiple overlapping oblique images because, as discussed above, it is “a composite product” *Id.* ¶ 4 (Dec. 13, 2022 Millin Dep. Tr. at 12:7–20 (SJA212); *see* Dec. 15, 2022 Celinski Dep. Tr. at 21:24–24:14 (SJA364)). *Id.* ¶ 12 (Dec. 13, 2022 Millin Dep. Tr. at 76:2–6 (SJA230)). This is undisputed.
- **Nearmap Oblique.** *Id.* ¶ 19 (Dec. 15, 2022 Celinski Dep. Tr. at 277:2–11 (SJA428); Dec. 13, 2022 Ridley Dep. Tr. at 18:2–19:12, 25:24–26:4 (SJA265, 267)). *Id.*; *see id.* (MapBrowser User Interface, Nearmap, <https://apps.nearmap.com/maps/> (last visited Jan. 26, 2023)).

Nor would panning within a single image satisfy the claim term as that is what the patent itself acknowledges as “common practice in [the] industry,” or prior art. ’518 Patent, Col.3:51–57 (JA0253); ’518 Patent, Col.3:61–62 (JA0523); Def.’s Mot. for Claim Construction at 23.

F. The ’960, ’568, ’152, and ’149 Patent Asserted Claims; Claims 21, 24, and 25 of the ’961 Patent; and Claims 10, 17, and 25 of the ’737 Patent Are Not Infringed Because MapBrowser, NMOS, and Nearmap 3D Mesh in Roof Geometry Technology Do Not Satisfy the Limitation of a 3D Model

Nearmap proposes that the term “three-dimensional model” / “3D model” is “a three-dimensional representation of a building roof that is generated based on aerial images with different views of the roof, which provides roof measurement information such as length, pitch, and area of sections of the roof.” EagleView argues otherwise. If EagleView is correct and the claimed “three-dimensional model” has no special meaning, then EagleView’s patent claims are

directed to unpatentable abstract ideas under § 101. But if the claimed “three-dimensional model” is accorded its correct construction, as aligned with the intrinsic evidence and what the inventors actually invented, there is no genuine dispute that Nearmap’s products do not infringe. *See Liebel-Flarsheim*, 481 F.3d at 1374–75, 80.

What EagleView appears to point to in Nearmap’s products as the claimed “three-dimensional model” is satisfied by (1) a collection of two-dimensional outlines of roof facets that are drawn onto an aerial image in MapBrowser, NMOS, and Roof Geometry Technology, (2) wireframe models or projections, and (3) 3D Mesh in Roof Geometry Technology. These are not “three-dimensional models” under Nearmap’s construction. **First**, the patent claims and specifications clearly distinguish between outlines, such as line drawings or wireframes, and the three-dimensional model. *See* Def.’s Mot. for Claim Construction at 17–18; *compare* ’737 Patent, Claim 1 (JA0186) *with* Claim 10 (JA0186); ’737 Patent, Col.14:13–35 (JA0181) (distinguishing between wireframe projection and 3D model). [REDACTED]

[REDACTED]

[REDACTED]

not a three-dimensional representation of a building roof. *See* SUMF ¶ 26 (Dec. 13, 2022 Millin Dep. Tr. at 132:4–10 (SJA244)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See Id.* ¶ 26 (Dec. 13, 2022 Millin Dep. Tr. at 132:4–10 (SJA244)). **Third**, Nearmap 3D Mesh is not a three-dimensional model, as claimed in the patents, because it provides “3D geometry available

for that location,” not a model of a roof with measurement information. *Id.* ¶ 4 (Dec. 13, 2022 Millin Dep. Tr. at 142:18–144:13 (SJA247–48)); *See* SUMF ¶ 7.

G. The ’568 Patent Asserted Claims and Claims 1, 2, 7, 21, 22, 24, and 25 of the ’961 Patent Are Not Infringed Because the Accused Products Do Not Satisfy the Limitation of Images Taken Independently of Each Other

Under Nearmap’s construction that the term means “aerial images that were taken by a camera without a known spatial relationship to each other,” there is no infringement. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 16 (Dec. 15, 2022 Celinski Dep. Tr. at 19:4–17 (SJA363)). [REDACTED]

[REDACTED] 18

(NEARMAP_0009736 at -379 (SJA006)). [REDACTED]

[REDACTED] *Id.* ¶ 14 (Dec. 13, 2022 Millin Dep. Tr. at 34:16–35:4, 87:20–25, 114:7–21 (SJA220, 233, 240)) [REDACTED]

[REDACTED]

[REDACTED] *see id.* ¶ 15 (Dec. 15, 2022 Celinski Dep. Tr. at 17:17–21 (SJA363))

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* ¶ 5 (Dec. 13, 2022 Millin Dep. Tr. at 55:11–56:12, 59:25–60:4, 63:10–64:1 (SJA225–227)).

EagleView alleges that the Accused Products satisfy the claim term because (1) Nearmap's aerial images are taken over several dates and multiple flights, and (2) the aerial images used to generate Nearmap 3D Mesh are taken independently on different dates. But this evidence has no bearing on whether the aerial images in question have known camera locations. There is thus no genuine issue of material dispute that Nearmap's Accused Products do not have "aerial images . . . taken independently of each other."

VI. CONCLUSION

For the foregoing reasons, Nearmap respectfully requests that the Court grant summary judgment of non-infringement of all asserted claims as to all Asserted Patents.

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By: /s/ Brent O. Hatch

Brent O. Hatch
HATCH LAW GROUP, PC

Nicholas Groombridge
Jennifer H. Wu
Jenny C. Wu
Jennifer Rea Deneault
Scott E. Miller
Timothy J. Beavers
GROOMBRIDGE, WU,
BAUGHMAN & STONE LLP
565 Fifth Avenue, Suite 2900
New York, New York 10017
332-269-0030 (telephone)
nick.groombridge@groombridgewu.com
jennifer.wu@groombridgewu.com
jenny.wu@groombridgewu.com
jenna.deneault@groombridgewu.com
scott.miller@groombridgewu.com
timothy.beavers@groombridgewu.com

Attorneys for Defendant Nearmap US, Inc.

WORD COUNT CERTIFICATION

I, Timothy J. Beavers, certify that this document Defendant's Motion for Summary Judgment

Pursuant to LPR 6.2 contains 12,395 words and complies with DUCivR 7-1(a)(4).

By: /s/ Timothy J. Beavers

Timothy J. Beavers

Groombridge, Wu,

Baughman & Stone LLP